SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1210

PAUL GINSBURG,

Petitioner,

vs.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY AND MAX PERLMAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PAUL GINSBURG,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul Ginsburg, prays that a writ of certiorari be issued to review two orders of the Supreme Court of Pennsylvania—the order refusing his Petition to Vacate Order of Non Pros and Reinstate Appeal and the order refusing his petition for reconsideration thereof.

Opinions Below

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, reported in 91 Pittsburgh Legal Journal 217, did not deal with the question presented herein as the question was not raised in that court.

The orders of the Supreme Court of Pennsylvania refusing the petition to vacate order of non pros and reinstate appeal (R. 5) and refusing the petition for reconsideration thereof (R. 10) were not accompanied by an opinion.

Jurisdiction

The orders of the Supreme Court of Pennsylvania sought to be reviewed were entered as follows: the order refusing PETITION TO VACATE ORDER OF NON PROS AND REINSTATE APPEAL, on October 2, 1944 (R. 5) and the order refusing PETITION OF PAUL GINSBURG FOR RECONSIDERATION OF HIS PETITION TO VACATE ORDER OF NON PROS AND REINSTATE APPEAL, on March 26, 1946 (R. 10). These are final decisions of the highest court of the State in which judgment could be had. Both petitions were timely filed. The petition to vacate the order of non pros was filed within ninety days from the date of petitioner's separation from the military service (R. 9) being within the time allowed by the Soldiers' and Sailors' Civil Relief Act of 1940. As for the petition for reconsideration, the Pennsylvania Supreme Court has no Rule limiting the time within which such petitions for reconsideration, as distinguished from petitions for reargument, must be filed. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

When an injunction decree issued by the Court of Common Pleas of Allegheny County, Pennsylvania, is pending before the Supreme Court of Pennsylvania on appeal, and your petitioner who is enjoined thereby and has a meritorious and legal defense thereto is unable to prepare and file assignments of error and briefs as required by Rule 60 of the Pennsylvania Supreme Court because of being

in the Army of the United States with the result that the court entered a judgment of non pros, did the orders of the Supreme Court of Pennsylvania refusing petition to vacate order of non pros presented within ninety days of petitioner's discharge from the military service and refusing petition for reconsideration thereof constitute a denial of petitioner's rights under the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, C. 888, 54 Stat. 1178, and particularly Sections 200 (4) and 201 of said Act?

Statute Involved

The Soldiers' and Sailors' Civil Relief Act of 1940, C. 888, 54 Stat. 1178, and particularly Sections 200 (1), (4) and 201 thereof, which are as follows:

> "Section 200. (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should

the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act (Oct. 17, 1940, C. 888, 54 Stat. 1180).

"Section 200. (4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment (Oct. 17, 1940, C. 888, 54 Stat. 1180).

"Section 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service (Oct. 17, 1940, C. 888, 54 Stat. 1181)."

Statement of the Case

The petitioner, on May 28, 1943, perfected an appeal to the Supreme Court of Pennsylvania as attorney for Philip Ginsburg from the Final Decree of the Court of Common

Pleas of Allegheny County (R. 1) which enjoined Phillip Ginsburg, *his counsellors, attorneys* and agents from instituting certain criminal proceedings against Charles H. Sachs, William C. McEldowney and Max Perlman on the charges of conspiracy and criminal libel (R. 7). Said Final Decree was issued by Rowand, P. J., and McNaugher and Thompson, JJ. At that time petitioner was in the Army of the United States and on furlough in connection with said litigation. The said injunction was effective as a decree against your petitioner who was Phillip Ginsburg's counsellor and attorney throughout the proceedings (R. 8). The successful prosecution of the said appeal before the Pennsylvania Supreme Court would dissolve the injunction for your petitioner (R. 8).

On September 27, 1943, the Supreme Court of Pennsylvania convened in Pittsburgh for the term of court when the said appeal was to be ready for argument. That day your petitioner, being in Pittsburgh on emergency furlough, appeared before said court, and on notice from your petitioner Attorneys Oliver K. Eaton and Louis Caplan for the appellees were present. Petitioner then made application to the court to continue argument on the appeal to the next term of court for the reason that he was unable to secure the requisite furlough to prepare and file assignments of error and briefs and thus be ready for argument, although his need of a furlough to prosecute the appeal and to argue it had been verified by the Home Service Secretary's Department of the American Red Cross at Pittsburgh (R. 8).

Attorney Eaton opposing the continuance told the court that your petitioner had been in Pittsburgh at least five to ten times on furlough since June 16, 1943, on which day Attorneys Eaton and Caplan, refusing to stipulate on the portions of the record to be printed, had served him with written notice to take certain steps in connection with prosecuting the appeal (R. 8). Your petitioner attempted to

correct the false impression created by Mr. Eaton's misstatement by explaining to the court that since that furlough in June, 1943, he had been in Pittsburgh for just a very few days and for other purposes (R. 8). Nevertheless the question of whether or not your petitioner had had sufficient time to prosecute the appeal was confused (R. 8) and, perhaps, that is the reason why the court entered its judgment of non pros, as otherwise such judgment should not have been entered because continuances of arguments on appeal are ordinarily granted and said application for continuance was the first (R. 9). However, it is significant that all the others who likewise appeared and requested continuances that day, all of whom were civilians, had their requests granted.

Your petitioner had requested consideration for the added reason that opposing counsel had been delaying the cause for lucre and malice and had been taking unfair advantage of petitioner's being in the military service, but to no avail. In support of this reason the court was informed that when opposing counsel ought to have been in the Court of Common Pleas for the final argument of the injunction on May 3, 1943, they deliberately did not appear. Attorney Louis Caplan gave no excuse. Attorney Oliver K. Eaton sent his associate, Attorney Jason Richardson, to inform the court that he (Eaton) could not appear for argument because he was out of the city on another case. Whereupon your petitioner proved to the court immediately that Mr. Eaton was in his office across the street. Later the same morning Mr. Eaton arbitrarily informed the court from his office through Mr. Richardson that he would not appear to argue the case until the next term of court. Although petitioner called said court's attention to the policy of the Bench and Bar since Pearl Harbor of accelerating the disposition of all matters for attorneys in or about to enter

the military service, and also to the obligation of everybody to lessen the number of days away from duty for any soldier, nevertheless the Common Pleas Court would not order the final argument set. In Philadelphia, on May 17, 1943, petitioner, about to present a mandamus petition before the Pennsylvania Supreme Court to have President Judge Harry H. Rowand of the Common Pleas Court of Allegheny County commanded to set the final argument, was informed by opposing counsel that Judge Rowand at Pittsburgh had just set the argument for May 19, 1943. After the argument the court refused to hand down the Final Decree within two or three days as it had indicated it would. Hence on May 25, 1943, petitioner served notice on the court and opposing counsel that he would seek relief from the Pennsylvania Supreme Court at Harrisburg the following day. Later the same day, May 25, 1943, the Common Pleas Court handed down the Final Decree, from which the appeal was taken to the Pennsylvania Supreme Court (R. 1).

It was further submitted that the mere filing of a Bill in Equity to enjoin the institution of such criminal proceedings constituted malicious abuse of process; and also that it enabled criminal defendants maliciously to frame a case as plaintiffs against a prosecutor.

The Pennsylvania Supreme Court's order entering judgment of non pros was dated September 28, 1943. The following month petitioner was shipped overseas. Upon his return he received an Honorable Discharge from the Army of the United States dated July 14, 1944 (R. 9). Within ninety days from said date of separation from the service, to wit, on October 2, 1944, petitioner filed his sworn Petition to Vacate Order of Non Pros and Reinstate Appeal (R. 3) in which it was averred, *inter alia,* that he had been unable to prosecute the appeal because he was in the Army and unable to secure the requisite furlough to do so (R. 3-4, and 9).

Counsel for appellees elected not to file an answer to said petition, which was summarily refused on October 2, 1944 (R. 5).

Petitioner filed his petition for reconsideration of his petition to vacate order of non pros and reinstate appeal on March 23, 1946 (R. 7), on the theory that the Pennsylvania Supreme Court, when it non prossed the appeal and again when it refused the petition to vacate order of non pros, had overlooked his rights under the Soldiers' and Sailors' Civil Relief Act of 1940 (R. 10).

Thus the Federal question was fairly presented by the record, and Pennsylvania practice did not require raising the Federal question at an earlier stage of the proceedings. When petitioner filed his petition to vacate order of non pros and reinstate appeal (R. 3) he did not expect that the Pennsylvania Supreme Court would not consider the Federal law in rendering its decision. Hence petitioner raised the Federal question in his petition for reconsideration (R. 9, 10).

Counsel for appellees and respondents elected not to file an answer to the petition for reconsideration. Hence the averments of that petition, like the averments of the petition to vacate order of non pros and reinstate appeal, must be taken to be admitted. Therefore, the only question which is, and which can be, raised before your Honorable Court is whether or not petitioner has been denied his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

Regarding any consideration that may be given by your Honorable Court to the doctrine of laches in connection with the timeliness of filing the petition for reconsideration, it is respectfully submitted that counsel for appellees and respondents accepted service of the petition (R. 10) and did not raise the question, that the Pennsylvania Supreme Court in refusing the petition (R. 10) did not deal with the question, that the Pennsylvania Supreme Court has no

Rule limiting the time within which such petitions for reconsideration, as distinguished from petitions for reargument, must be filed, and that furthermore the doctrine of laches cannot be raised in this case because laches does not affect the rights of government. Laches is purely a personal matter, and has no application in a suit of a public or *quasi* public nature. The decree enjoining your petitioner in effect enjoins the Commonwealth of Pennsylvania although the Commonwealth is not a party to the proceeding. Upon the dissolution of the injunction, the prosecution would be conducted by the Commonwealth of Pennsylvania *ex rel.* Paul Ginsburg, the prosecutor, of course, being the Commonwealth.

The order of the Pennsylvania Supreme Court refusing the petition for reconsideration of the petition to vacate order of non pros and reinstate appeal was entered on March 26, 1946 (R. 10).

Specification of Errors to Be Urged

The Pennsylvania Supreme Court erred:

1. In refusing petition to vacate order of non pros and reinstate appeal, thereby denying petitioner his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

2. In refusing petition for reconsideration of petition to vacate order of non pros and reinstate appeal, thereby denying petitioner his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.

Reasons for Granting the Writ

1. *The court below denied petitioner his rights under the Soldiers' and Sailors' Civil Relief Act of 1940.*—Section 201 of the Act provides, as applied to the instant case, that when petitioner made application to the court for continu-

ance (R. 8), the proceeding "shall" be stayed unless, in the opinion of the court, petitioner's ability to prosecute the appeal was not materially affected by reason of his military service. Therefore, the Pennsylvania Supreme Court should have continued argument on the appeal, instead of entering judgment of non pros, because there was nothing upon which it could properly have based an opinion that petitioner's ability to prosecute the appeal was not materially affected by reason of his military service. On the contrary, it affirmatively appeared that petitioner's ability to prosecute the appeal was materially affected by reason of his military service (R. 8). Nevertheless the court did not deal with this question in its decision. It simply non prossed the appeal because of non-compliance with Rule 60 (R. 3).

Under Section 200 (4) of the Act, the Petition to Vacate Order of Non Pros and Reinstate Appeal, filed within ninety days of petitioner's separation from the military service (R. 3, 9), ought to have been granted. This section also contains the following: "provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof." Petitioner has a meritorious and legal defense to the injunction suit (R. 9), which will be set forth in the second reason for granting the writ, which follows:

The petition for reconsideration (R. 7) was filed, *inter alia*, on the theory that the Pennsylvania Supreme Court overlooked petitioner's rights under the Soldiers' and Sailors' Civil Relief Act of 1940 when it non prossed the appeal and again when it refused the petition to vacate the order of non pros (R. 10). However, the court's refusal of the petition for reconsideration could not have been the result of an oversight. It was deliberate. It was a summary denial of petitioner's rights under the Federal law, without even dealing with the question presented. It was just an-

other manifestation of the arbitrary and apparently biased attitude the court has had toward petitioner (in connection with this matter only), which will be dealt with in the third reason for granting the writ, which follows:

2. *Petitioner has a meritorious and legal defense to the injunction suit.*—The injunction is illegal. That a court of equity has no jurisdiction to enjoin the institution of such criminal prosecutions is elementary. The leading case in the State of Pennsylvania on that question is *Meadville Park Theatre Corp.* v. *Mook*, 337 Pa. 21, 10 A. 2d 437, the Opinion of the Court having been written on January 2, 1940, by Mr. Justice Maxey.

In that case the preliminary injunction was directed to the district attorney, the county detective, the constable and the individual who lodged the information with the alderman. The Opinion of the Court referred to the important authorities on the subject, which would sustain the same decision whether the injunction issued against the district attorney or the individual who lodged the information. As a matter of fact, such an injunction against individuals in effect enjoins the district attorney and the Commonwealth, although the Commonwealth is not a party to the injunction proceedings.

Chief Justice Maxey made some very interesting observations in that most learned Opinion, pp. 23-24:

> "In appellants' brief the only question raised is whether or not the theatre corporation violated the anti-lottery laws of the Commonwealth, i. e., the Act of March 31, 1860, P. L. 382, sections 52 and 53. The much more important question as to whether the court below had the power, on this record, to restrain the district attorney from conducting a prosecution against the theatre corporation is nowhere referred to by appellants.

"Regardless of this fact, we shall discuss and decide this latter question. A part of the duty of this court is to 'keep all inferior jurisdictions within the bounds of their authority': Com. v. Ragone, 317 Pa. 113, 127, 176 A 454. That a court of equity's restraining of a district attorney in the performance of his official duty is a most unusual procedure is evidenced by the fact that this is the first time any appellate court of this state has been called upon to review such a case.

"In the equity proceedings for an injunction no attack was made on the validity of the laws which the theatre corporation was charged with violating. The complaint is that the acts the district attorney was proceeding against did not amount to a violation of the criminal laws. In other words, the corporation pleads 'not guilty' to the charges filed against it and demands that a court of equity try that issue. This a court of equity cannot do.

"A district attorney is a constitutional officer with a mandate from the state to proceed with prosecutions of violations of criminal laws. Only confusion and frustration in the enforcement of these laws would result if a person arrested or about to be arrested for their violation could by transforming himself into a complainant and a district attorney into a defendant, in civil proceedings, have his guilt or innocence adjudicated by a court of equity. The Commonwealth (as well as alleged law breakers) has an interest in the maintenance of the right of trial by jury. The machinery of the criminal law is designed for the protection of society and the office of district attorney is an important part of that machinery. It is difficult to conceive of anything more opposed to sound public policy than to permit an accused to obstruct by means of a suit in equity to which the state itself is not a party the operation in his case of the machinery of criminal procedure which has been constitutionally established to protect the public welfare."

Chief Justice Maxey made the following citation, p. 28, in that Opinion:

> "In Pennsylvania R. R. Co. v. Ewing, 241 Pa. 581, 586, 88 A. 775, this court, in an opinion by Justice Brown, said: 'Courts of equity deal only with civil and property rights, and are without jurisdiction to interfere by injunction with the administration of criminal justice.' "

Chief Justice Maxey concluded that Opinion, p. 29, as follows:

> "The Park Theatre Corporation, having been prosecuted for violation of a criminal statute, must submit to the court of quarter sessions as the exclusive tribunal for the adjudication of its guilt or innocence. A court of common pleas sitting in equity cannot take over the functions of the criminal courts. Since the court whose decree is appealed from was without power to enter it, the question whether the corporation violated the anti-lottery laws is not properly before us.
>
> "The decree is reversed at appellees' cost."

Furthermore, for a meritorious and legal defense to the injunction decree, in addition to the court's lack of jurisdiction, it is respectfully submitted that it was improper for the Court of Common Pleas of Allegheny County to have issued the injunction against your petitioner who was not a party to the proceeding but was merely an attorney representing the party.

3. *The court below was arbitrary and apparently biased.* —The circumstances, as set forth in the Statement of the Case, *supra,* under which the Pennsylvania Supreme Court repeatedly refused every application made to it by petitioner, could lead to no other conclusion. The court below cannot justify its order on legal grounds. It did not even attempt to do so. While petitioner was in the military

service and since his separation therefrom he has, in this and related proceedings, applied to the Pennsylvania Supreme Court many times for a decision on the merits of the fundamental question presented herein. The court has summarily dismissed every such application, not on the merits and without an opinion. Your petitioner has repeatedly contended that if the Pennsylvania Supreme Court does not reverse the Court of Common Pleas of Allegheny County in this case, confusion and corruption will result. There is no precedent for such an injunction decree, which interferes with the administration of criminal justice and deprives a prosecutor of the right of trial by jury. Hence this case is of public importance.

The court in the exercise of its judicial function, not arbitrary, would grant petitioner his rights not only under the Soldiers' and Sailors' Civil Relief Act of 1940, but also in the interest of equal justice under the law.

Conclusion

It is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

PAUL GINSBURG,
Counsel for Petitioner.

May, 1946.

Supreme Court of the United States

OCTOBER TERM, 1945

NO. 1210.

PAUL GINSBURG, Petitioner,

v.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY and MAX PERLMAN.

BRIEF FOR RESPONDENTS, CHARLES H. SACHS, WILLIAM C. McELDOWNEY AND MAX PERLMAN, OPPOSING PETITION FOR CERTIORARI.

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OPINIONS BELOW.

While the petitioner mentions the opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, reported in 91 Pittsburgh Legal Journal 217, the petitioner states that this opinion "did not deal with the question presented herein as the question was not raised in that court".

However, as the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, upon which the petitioner relies, requires, as a condition to the opening of a judgment, that "the defendant has a meritorious or legal defense", and as the petitioner attempts in his petition to show that petitioner's client has a meritorious and legal de-

fense in the very suit in which the opinion just referred to was filed, that opinion is printed as an Appendix to this Brief, so that this court may see for itself how utterly lacking in merit the case of petitioner and his client really is.

JURISDICTION OF THIS COURT.

It is respectfully submitted that this court is now without jurisdiction to grant a writ of certiorari in this case, because the petition for certiorari was not filed until May 7, 1946, whereas the judgment of non pros which is complained of by the petitioner was entered by the Supreme Court of Pennsylvania on September 28, 1943 (R. 1), so that the limitation of three months prescribed by 28 USCA 350 had expired long before the petition for certiorari was filed in this court. (Although the petition for certiorari is professedly directed against the orders refusing the petition to vacate the non pros and the petition for reconsideration, the actual objective is obviously the judgment of non pros).

QUESTIONS PRESENTED.

May an attorney-at-law, who was not a party to a suit in the court of original jurisdiction, but merely appeared as attorney for the defendant therein, and who did not appeal to the highest court of the State from an injunction enjoining the defendant, "his counsellors, attorneys and agents", now claim in his own right (and not in the right of his civilian client) the benefit of the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, because this attorney was a member of the United States Army when the judgment of non pros was entered, al-

though he appeared in person in the highest court of the State in opposition to the entry of such judgment?

Where a judgment of non pros of an appeal was entered by the Supreme Court of Pennsylvania on September 28, 1943, and a petition for a writ of certiorari to review that judgment was not filed in the Supreme Court of the United States until May 7, 1946, is not that petition barred by the three months' limitation of 28 USCA 350, even though a petition to vacate the non pros was filed in the Supreme Court of Pennsylvania on October 2, 1944, and refused the same day, and a petition to reconsider the former petition and to vacate the non pros was filed on March 26, 1946, and refused on March 26, 1946?

COUNTER-STATEMENT OF THE CASE.

On May 25, 1943, the Court of Common Pleas of Allegheny County, Pennsylvania, entered an injunction (R. 7) in the suit of Charles H. Sachs, William C. McEldowney and Max Perlman, as plaintiffs, versus Philip Ginsburg, as defendant, enjoining the defendant, his counsellors, attorneys and agents, from instituting further criminal proceedings against the plaintiffs, charging them with conspiracy or criminal libel in connection with certain matters embraced in various informations previously made by the defendant, all of which had been disposed of adversely to the prosecutor in the criminal courts of the county. The subject matter of the litigation which resulted in this injunction, and the history of the prior criminal proceedings, will be found in the opinion of the Court of Common Pleas which is printed as an Appendix to this brief.

The present petitioner, Paul Ginsburg, who is an attorney-at-law, was not a party to the injunction suit.

He was not named as a plaintiff or defendant and his entire connection with the case was that he appeared as attorney for his father, the defendant, Philip Ginsburg.

On May 28, 1943, the defendant, Philip Ginsburg, entered an appeal in the Supreme Court of Pennsylvania from the injunction decree (R. 1). The appeal was filed solely in behalf of the defendant, Philip Ginsburg (R. 2). The present petitioner, Paul Ginsburg, was not a party to this appeal. He merely appeared as attorney for his father, the appellant (R. 2).

On September 28, 1943, the Supreme Court of Pennsylvania entered a judgment of non pros on the appeal of Philip Ginsburg, because the appellant had not filed assignments of error and briefs as required by Rule 60 of that court (R. 3).

This order was entered on the day following the personal appearance of the petitioner, as attorney for his father, in the Supreme Court of Pennsylvania, in opposition to the entry of such order (Petition, page 5). At that time, the petitioner was a member of the United States Army, but his father, Philip Ginsburg, was then, and at all other times involved in this litigation, a civilian residing in Pittsburgh, Pennsylvania.

Nothing whatever was done in this matter between September 28, 1943, when the non pros was entered, and October 2, 1944, more than a year later, when the petitioner filed a petition with the Supreme Court of Pennsylvania, asking that court to vacate the order of non pros and reinstate the appeal of Philip Ginsburg (R. 3). This petition was refused by the Supreme Court of Pennsylvania on October 2, 1944 (R. 5).

Nothing further was done between October 2, 1944, and December 24, 1945, more than another year later,

when the appellant, Philip Ginsburg (not the petitioner) filed a petition in the Supreme Court of Pennsylvania asking that the order of non pros entered on September 28, 1943, be vacated (R. 5). That petition was refused on January 7, 1946 (R. 7).

On March 23, 1946, the petitioner, Paul Ginsburg, claiming, for the first time in this litigation, that the injunction decree was effective as a decree against him because he was attorney for the defendant in that suit, filed a petition in his own name in the Supreme Court of Pennsylvania (R. 7), asking that court to reconsider the petition filed on October 2, 1944, and to vacate the order of non pros entered on his father's appeal, on the ground that, as attorney for the appellant in that appeal, the petitioner was entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940. That petition was refused by the Supreme Court of Pennsylvania on March 26, 1946 (R. 10).

On May 7, 1946, some two years and seven months after the appeal of Philip Ginsburg, the petitioner's father, was non prossed by the Supreme Court of Pennsylvania, the petitioner, Paul Ginsburg, who was not the appellant in the Supreme Court of Pennsylvania, filed a petition in his own name in this court for a writ of certiorari to review the judgment of non pros against his father.

Petitioner's father, Philip Ginsburg, who was the sole defendant in the Court of Common Pleas of Allegheny County and the sole appellant in the Supreme Court of Pennsylvania, is not a party to the present petition for a writ of certiorari.

We have not attempted in this Counter-statement of the Case to discuss the many statements made in the petitioner's Statement of the Case and elsewhere in his petition which have no basis whatever in the record. We should, however, like to say that the statement of counsel for the petitioner, on page 6 of the petition, that "opposing counsel had been delaying the cause for lucre and malice and had been taking unfair advantage of petitioner's being in the military service", is not only not supported by anything that appears in the record of this case, but is also without any foundation in fact. Like petitioner's reference, on page 7 of the petition, to "criminal defendants", it is of a pattern with the reckless and irresponsible statements which caused the Supreme Court of Pennsylvania to enter three orders of expungement of scandalous matters appearing in briefs filed by the petitioner in a related mandamus case referred to on page 4 of the Record herein.

ARGUMENT.

I. The petitioner was not a party to the appeal which was non prossed by the Supreme Court of Pennsylvania.

The appeal to the Supreme Court of Pennsylvania which was non prossed by that court on September 28, 1943, (R. 3), was not the appeal of the present petitioner, Paul Ginsburg, but the appeal of his father, Philip Ginsburg, who was the sole defendant in the suit in which the injunction decree was entered and the sole appellant in the Supreme Court of Pennsylvania (R. 2).

Petitioner's sole connection with that case was as attorney for the defendant-appellant. Petitioner could not have taken an appeal from the decision of the court below granting the injunction, even if he had wanted to do so, and, whether he wanted to or not, the fact remains that he did not take an appeal. He has since,—a year later,—sought to make himself a party to the record by filing a petition asking for the vacation of the order of non pros (R. 5) and,—more than another year later,—a petition asking reconsideration of his petition to vacate the order of non pros (R. 10).

Petitioner cannot inject himself into this case by claiming that a decree which could only affect him in his representative capacity is a decree against him in his individual capacity, which gives him the right, at this late date, to pick up this stale litigation which his father, the actual appellant in the Supreme Court of Pennsylvania, has long since failed to pursue.

II. The Soldiers' and Sailors' Civil Relief Act has no application to this case because the judgment of non pros in the Supreme Court of Pennsylvania was not entered against an appellant in the military service.

There is no pretense by the petitioner in this case that his father, Philip Ginsburg, who was the sole defendant in the Court of Common Pleas of Allegheny County and the sole appellant in the Supreme Court of Pennsylvania (R. 2), was ever in the military service. Actually, he is a civilian and has been so at all times involved in this litigation.

The Soldiers' and Sailors' Civil Relief Act is a statute enacted for the protection of defendants in the military service. It is an act for the relief of "Soldiers and Sailors", and not for the relief of civilian defendants.

Nor is a defendant entitled to the protection of the statute merely because he happens to have an attorney who, during the course of the litigation, is drafted into the military service. Obviously, the statute offers no relief in a situation of this kind, because there were still many lawyers (at least one thousand in Allegheny County) not in the military service who were available to represent civilian defendants.

If it were otherwise, a civilian defendant could deliberately delay the prosecution of a case by refusing, as the defendant in this case has done, to retain other counsel. That the defendant elected not to retain other counsel cannot result in giving the defendant (who would obviously receive the benefit of an order vacating the non pros) the benefits of the Soldiers' and Sailors' Civil Relief Act.

III. The Soldiers' and Sailors' Civil Relief Act has no application to this case because no default judgment was entered.

The Soldiers' and Sailors' Civil Relief Act could be of no avail to the petitioner, because the petitioner actually appeared in person in the Supreme Court of Pennsylvania in opposition to the entry of judgment of non pros.

Section 200(1) of the Soldiers' and Sailors' Civil Relief Act, upon which the petitioner relies in this case, relates to any action or proceeding, "if there shall be a default of any appearance by the defendant". Far from there having been a default of appearance by the defendant-appellant in that case, the petitioner states, on page 5 of his petition, that on September 27, 1943, the day before the non pros was entered, he appeared before the Supreme Court of Pennsylvania and made application to continue argument on his father's appeal. Instead of continuing the argument, the court entered a judgment of non pros for failure to comply with its rules.

This was not a judgment in "default of any appearance by the defendant".

IV. Neither the petitioner nor his father has a meritorious or legal defense to the injunction suit.

The Soldiers' and Sailors' Civil Relief Act offers its protection, to those in the armed services, only if it is made to appear "that the defendant has a meritorious or legal defense", Section 200(4). Even if the petitioner were a proper party in this court, (which is not the case), he has failed to establish the existence of a "meritorious or legal defense". His attempt to brush aside the opinion of the Court of Common Pleas, on the ground that "it did not deal with the question presented herein" (Petition, page 1) is evidence of his refusal to face the issue squarely. Actually, that opinion is the complete answer to his claim that he has a defense on the merits.

The injunction from which the appeal to the Supreme Court of Pennsylvania was taken was not an injunction prohibiting the defendant (father of the petitioner) from filing a criminal information in a matter which had never previously been before the criminal courts of the county. On the contrary, it was an injunction to prevent vexatious and unwarranted litigation in the form of further criminal prosecutions arising out of matters which had been raised in prior prosecutions in the criminal courts and which had been dismissed consistently by those courts.

The opinion of President Judge Rowand, in the Court of Common Pleas of Allegheny County, which appears as an Appendix to this brief, recites the various criminal proceedings which had been instituted by the defendant against the respondents herein, and the

disposition made of those cases, before the injunction suit was filed. As the opinion indicates, it was only after the defendant had been rebuffed repeatedly in the criminal courts and had threatened nevertheless to harass the respondents with further criminal prosecutions for alleged conspiracy and criminal libel, based upon evidence which the courts had held did not support these charges, that the court entered an injunction against the defendant to restrain him from filing further informations on the same charges.

The Pennsylvania cases cited by petitioner do not support his present contention. In none of them had the courts been asked to restrain threatened criminal prosecution after the criminal courts had passed upon similar prosecutions by the same prosecutor against the same defendants. On the contrary, in *Meadville Park Theatre Corp. v. Mook,* 337 Pa. 21, 10A. 2d 437, which is so much relied upon by the petitioner, the Supreme Court of Pennsylvania said, at page 28:—

> "We regard it as well settled * * * that, except in cases where a multiplicity of suits would constitute reason for an exception * * * a court of equity will not intervene, but will leave the plaintiff to have his rights determined in the criminal proceeding."

The case at bar presents an outstanding example of "a multiplicity of suits" and of vexatious litigation persisted in after the criminal courts had repeatedly disposed of the same subject matter. Obviously, the case fails to present that "meritorious or legal defense" which the Soldiers' and Sailors' Civil Relief Act demands of those who seek its benefits.

V. The applicability of the Soldiers' and Sailors' Civil Relief Act was raised too late.

The judgment of non pros in this case was entered by the Supreme Court of Pennsylvania on September 28, 1943 (R. 3). Although the petitioner was then already in the United States Army and appeared in court in opposition to the non pros (Petition, page 5), and although he filed a petition to vacate the order of non pros on October 2, 1944, (R. 3) and a second petition to the same effect on December 24, 1945, (R. 5), he did not raise any question as to the applicability of the Soldiers' and Sailors' Civil Relief Act,—the only Federal question involved in the petition,—until March 23, 1946, when he filed another one of his repeated petitions. Obviously, this question, raised for the first time two and one-half years after the original non pros was entered, came much too late.

> "Federal questions first presented to the highest state court on a petition for rehearing come too late for consideration by the Supreme Court of the United States, unless the state court exerted its jurisdiction in such a way that the case could have been brought to the Supreme Court had the questions been raised prior to the original disposition."
>
> *Radio Station WOW v. Johnson,* 326 U. S. 120, 89 L. Ed. 1397 (1945).

Actually, there is no Federal question in this case, because as we have shown above, the Soldiers' and Sailors' Civil Relief Act has no applicability here. The judgment of non pros was a judgment entered by a State court in conformity with its own rules of practice. But even if there were a Federal question, it was raised much too late to help the petitioner.

VI. The petition for writ of certiorari was filed too late.

The petition for writ of certiorari in this case was filed on May 7, 1946, some two years and seven months after the Supreme Court of Pennsylvania, on September 28, 1943, entered the judgment of non pros which forms the real objective against which the present petition is directed. (Although the petition nominally asks for a review of the orders refusing the petition to vacate the non pros and the petition for reconsideration, the real object of attack is obviously the judgment of non pros).

Nothing further was done in the case until October 2, 1944, when a petition to vacate the non pros was filed and refused. Again, nothing further was done until December 24, 1945, when another petition was filed to vacate the order of non pros. This petition was refused on January 7, 1946. On March 23, 1946, the petitioner filed a petition asking the court to reconsider the petition filed on December 24, 1945, and to vacate the non pros. This petition was refused on March 26, 1946.

The time for making application for writs of certiorari is fixed by 28 USCA 350, which provides that:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *".

This statutory limitation of three months expired in this case on December 28, 1943, three months after the Supreme Court of Pennsylvania entered its judgment of non pros.

It is of no avail to the petitioner that on March 23, 1946, less than three months before the petition for cer-

tiorari in this case was filed, petitioner filed a petition for reconsideration of the petition filed on December 24, 1945, and for the vacation of the non pros. New life cannot be breathed into these dead bones by this belated action of the petitioner.

> "The thirty days' limitation prescribed by general order in bankruptcy No. 36 for taking an appeal from a final order of a circuit court of appeals in a bankruptcy case cannot be extended by filing a petition for rehearing after the thirty days have expired, although there may be but one term of that court, and by its rules of practice, petitions for rehearing may be presented at any time during the term."
>
> *Conboy, Trustee v. First National Bank of Jersey City,* 203 U. S. 142, 51 L. Ed. 128 (1906).

Conclusion.

It is respectfully submitted that the petition for writ of certiorari in this case is entirely without merit or foundation. It is obvious that the petitioner in his individual capacity is a total stranger to these proceedings and that the petition itself was filed long after the expiration of the period during which a petition for certiorari might properly be filed with this court.

Actually, this case involves nothing more than the interpretation and enforcement by the Supreme Court of Pennsylvania of its own rules of procedure, evidenced by a judgment entered on September 28, 1943, non prossing an appeal to which the petitioner was not a party.

Respectfully submitted,

LOUIS CAPLAN,
Counsel for Respondents.

APPENDIX.

Sachs et al. v. Ginsburg.

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ROWAND, P. J., April 29, 1943.—The plaintiffs filed their bill to enjoin the defendant from bringing criminal charges against the plaintiffs. It appears that the defendant, as prosecutor, had charged the defendants before divers magistrates with conspiracy and libel arising out of certain transactions that had taken place in the bank of which the plaintiffs were officers. The defendants having been arrested and bound over to the court and furnished bail, but, on petition of *habeas corpus,* they were discharged for the reason that no crime had been committed as alleged.

The parties: Charles H. Sachs is a member of the bar of this county and has been active in the practice of law for upwards of forty (40) years; he was attorney for the Washington Trust company. William C. McEldowney, a gentleman upwards of seventy-five years of age, is also a member of the bar of this court, but not engaged in active practice, but has been president of the Washington Trust company for a number of years. Max Perlman is and has been treasurer of the Washington Trust company for a number of years. Phillip Ginsburg, defendant, was a merchant. All parties are residents of the county of Allegheny.

A hearing was entered into, both parties presenting their testimony in full; the same has been considered carefully and, from this, we find the following findings of fact.

FINDINGS OF FACT

1. On May 12, 1941, the defendant, Phillip Ginsburg, was indebted to the Washington Trust company on a promissory note in the sum of $750.00, the due date of the note being June 3, 1941; this note was without security. On the same day, or May 12, 1941, the defendant made a further loan from the Washington Trust company in the sum of $5,100.00, this was a collateral note, payable on demand. The collateral pledged for payment of this note being book accounts of the defendant totaling $6,777.52. On said note appears "as per schedule dated May 12, 1941, attached, assigned to the Washington Trust company of Pittsburgh, Pa." The note further recites that the defendant "pledged and deposited herewith as collateral security for payment of this or any other liability or liabilities" the described collateral.

2. On the day of delivery of the note as referred to in findings of fact No. 1, the defendant executed what is referred to as "assignment of book accounts" (plaintiffs' exhibit No. 1). On examination of this exhibit we find the following covenants and warrants:

"5. That assignor will not do or suffer anything to be done that shall or may hinder or prevent the assignee from collecting payment of said accounts."

Upon the same day the defendant had delivered to the trust company separate statements of the "assignment of book accounts" each of which was stamped with assignment stamp.

3. There was not at any time any valid oral understanding between the parties that either destroyed, nullified or modified the terms of the demand collateral note,

the written assignment stamped on the book accounts or the written "assignment of book accounts."

4. On May 29, 1941, the defendant being still indebted to the trust company on his note of $750.00, which was without collateral, and indebted in the sum of $3,792.11 on the principal of the note of May 12, 1941, (payments on account of the principal having been made decreasing the debt due on the principal to that amount) on a demand collateral note similar in form to the note of May 12, 1941, and containing the specific pledge of the security for the payment of defendant's "other liability of liabilities," borrowed the further sum of $1,050.00, delivered his demand note in that amount, under date of May 29, 1941, to the trust company and assigned book accounts in the sum of $1,346.48; he also delivered separate statements of said book accounts which were duly stamped as assigned; and he further executed an additional written "assignment of book accounts" containing the same provisions or warranty that the assignor would not do or suffer anything to be done that would hinder or prevent the assignee (the trust company) from collecting payment of said accounts. There was not any valid oral understanding between the parties destroying, nullifying or modifying the terms of the demand collateral note or the written "assignment of book accounts."

5. On May 29, 1941, the defendant anticipated renewal of his non-collateral promissory note by discounting a new note in the sum of $500.00 due in sixty days, to-wit, July 28, 1941; this note was further renewad for thirty days in the sum of $500.00, due August 27, 1941; and although it became due the defendant did not renew it at maturity and it became overdue and unpaid and so remained until October 23, 1941.

6. On each of the collateral notes of May 2, 1941, and May 29, 1941, as heretofore referred to, defendant was permitted to receive collections from the debtors upon the understanding that such payments should be promptly remitted to the bank and they were so remitted to the bank in a number of instances, being paid by defendant's check, accompanied by a memorandum identifying the collection as to invoice and amount, with the result that on August 22, 1941, the original collateral note of $5,100.00 had been reduced so that the balance of the principal was then $265.11 and the balance of principal on the note of May 29, 1941, was $990.21.

7. On August 22, 1941, the defendant went to the office of the trust company and paid the balance of principal on the note of May 12, 1941, in the sum of $265.11 and then disclosed to Messrs. McEldowney and Perlman, the president and treasurer respectively, two of the plaintiffs herein, that he had collected the accounts, or most of them, and had used the money for other purposes, that is, to pay creditors other than the bank, at the same time demanding the return of the collateral deposited on the note of May 12, 1941, which was refused, for the reason that such collateral was pledged for his other liabilities, to-wit, the second collateral note and his promissory note, by the express terms of his note of May 12, 1941.

8. Learning of these facts the proper officers of the trust company directed that the balance remaining on defendant's checking account be applied on account of the principal of the note of May 29, 1941, which was accordingly done and proper notation made on the back of said collateral note.

9. Mr. McEldowney, president of the trust company, sent for and consulted with Mr. Sachs, solicitor for as well as an officer of the trust company, and discussed with him what action the bank should take about notifying the debtors of the assigned accounts. The facts were brought to the attention of the board of directors on Monday, August 25, 1941, at a regular meeting, at which time a resolution was passed that notice should be sent to the various debtors that their accounts had been assigned to the trust company by the defendant and the same were due and payable to the trust company.

10. In compliance with said resolution by the board of directors, Mr. Sachs drafted a letter and instructions were given to a Mr. Drutis, assistant secretary of the trust company, to calculate from the memorandum slips delivered to the trust company by the defendant, and the defendant's checks in payment of accounts, the amounts due from debtors of the assigned accounts, and this was done by taking the original amount of the account, giving credit for the collection made by the defendant according to his memorandum slips and his checks given in payment, and thus arriving at the balance due. Letters were sent out separately addressed to each of the debtors including the correct amount of the balance due as showed by defendant's report to the bank and his statements of account. The following being a form of the letter:

"WASHINGTON TRUST COMPANY
OF PITTSBURGH, PA.

Wm. C. McEldowney, President
Chas. H. Sachs, Vice President
Max Perlman, Treasurer & Trust Officer
E. L. Boyle, Secretary
H. W. D'Essipri, Assistant Treasurer
S. F. Drutis, Assistant Secretary

Washington Trust Company Building
Fifth Ave. and Washington Place

Pittsburgh, Pa., August 27, 1941

"Please take notice that your account amounting to ..... dollars due Phillip Ginsburg & Co., 202 American Bank Building, Pittsburgh, Pa., has been assigned to the Washington Trust Company of Pittsburgh, Pa., and all payments must be made direct to us.

"Please send us your check for the amount at once and oblige.

Very truly yours,

Max Perlman
Treasurer"

MP:AY

11. On December 10, 1941, the defendant, Phillip Ginsburg, through his then counsel, Elverton H. Wicks, filed suit in trespass against the trust company at No. 2687 January Term, 1942, in which the declaration as filed alleges that the series of letters of August 27, 1941, a copy of which is set forth in full in the preceding finding of fact, constituted libel and in which general and punitive damages were claimed by the plaintiff of the trust company in the sum of $25,000.00. The record shows that the writ was served December 12, 1941, and

on January 14, 1942, a rule for a bill of particulars was filed. On January 22, 1942, the bill of particulars was filed and no further proceeding on said case has since been taken, that is, the case has never been put to issue nor has any effort been made by the plaintiff to have it disposed of, although Paul Ginsburg, who is a member of this court and counsel for his father, on November 16, 1942, entered his appearance for the plaintiff; Mr. Wicks having died in the spring of 1942.

12. The defendant here, Phillip Ginsburg, and being represented by his son Paul Ginsburg, on May 26, 1942, before Alderman Newell of the city of Pittsburgh, and by information filed, charged the three plaintiffs with conspiracy to impoverish the prosecutor and to deprive and hinder him from following his trade and business as a merchant, said conspiracy being based upon joint action or actions of the three plaintiffs herein in causing the letters, dated August 27, 1941, to be mailed to the various debtors of Phillip Ginsburg. Warrants for the arrest of these three plaintiffs were issued and the plaintiffs were arrested and gave bail for hearing.

13. Again on the 28th day of May, 1942, Phillip Ginsburg, the defendant here, accompanied by his son Paul Ginsburg, who was then acting as attorney for his father, appeared before Alderman Newell and an information was filed charging the three plaintiffs herein with the crime of libel. Warrants were issued and again the three plaintiffs were arrested.

14. On May 29, 1942, hearing was had on both charges before Alderman Newell and because of the behavior of the prosecutor Phillip Ginsburg, and the defendant here, in refusing to answer proper questions on cross-examination, and being instructed and advised at

the time by his counsel, his son and lawyer, a full hearing was not had; the defendants did not offer any evidence and they were accordingly held for court on both charges of conspiracy and libel.

15. The three plaintiffs having surrendered themselves into the custody of John Haney, constable, they then presented their separate petitions for writ of *habeas corpus* to the court of quarter sessions of Allegheny county, which appear as Nos. 1, 2 and 3 June sessions, 1942, miscellaneous. On the relation of William C. McEldowney at No. 1 June sessions, 1942; on the relation of Max Perlman at No. 2 June sessions, 1942; and on the relation of Charles H. Sachs at No. 3 June sessions, 1942, wherein they alleged their detention was illegal and that the evidence was insufficient and the proceedings were illegal. The case came on to be heard before Honorable William H. McNaugher, a member of this court, then presiding in the court of quarter sessions, and, after testimony was taken and arguments had, the court entered in each case an order under date of July 16, 1942, sustaining the writs of *habeas corpus* and directing the discharge of relators, and in an opinion filed the court said:

"* * * There might be some room for argument as to the insufficiency of the evidence produced, but we think it plain that the proceeding was 'conducted not in accordance with law,' and that on this ground if not on the other the relator is entitled to relief.

"A review of the transcript reveals what we regard as gross irregularity in the examination of the prosecuting witness. On cross-examination by counsel for those who were the defendants in the proceeding, the attorney for the prosecutor sometimes suggested the

answer which the witness should give, sometimes himself gave the answer, frequently directed the witness not to answer certain questions which we find to have been relevant, and finally withdrew him altogether and thus made further cross-examination impossible. * * *"

16. On August 4, 1942, the defendant, Phillip Ginsburg, further appeared before Alderman Murray of the city of Pittsburgh and filed identical informations against the three plaintiffs herein, one charging conspiracy and the other charging libel. Warrants were duly issued and the three defendants were again arrested and gave bail, and hearing was set for August 12, 1942, at which time both cases were heard together. The three defendants were held for court on the charge of conspiracy and because the evidence did not support the charge of libel, the defendants were discharged.

17. The three plaintiffs here, or defendants there, again surrendered themselves into the custody of George McFarland, a constable, and again three separate petitions for writ of *habeas corpus* were filed at Nos. 192, 193 and 194 June sessions, 1942, miscellaneous, alleging illegal detention and that the evidence was insufficient. The cases came on for hearing and were heard together on August 21, 1942, at which time, testimony was taken and the cause was argued by counsel, and at which time the court made the following order:

"The court being of the opinion that the evidence is insufficient the writ is sustained and the relator is discharged."

The same order was made in each case.

18. On November 2, 1942, Phillip Ginsburg again, through his son and counsel Paul Ginsburg, at No. 444 June sessions, 1942, miscellaneous, in the case entitled

Commonwealth of Pennsylvania v. William C. McEldowney, Charles H. Sachs and Max Perlman, filed his petition reciting that Phillip Ginsburg, by information filed on May 26, 1942, before Alderman Newell, charged Messrs. McEldowney Sachs and Perlman with the crime of conspiracy and that they were held for court; that writs of *habeas corpus* were granted and pursuant thereto Messrs. McEldowney, Sachs and Perlman were discharged on the 16th day of July, 1942, the district attorney presented his motion for *nolle pros.* and accordingly an entry of *nolle pros.* was made as to the charge of conspiracy and that said allowance of *nolle pros.* was improper because it was made without the consent of the prosecutor, and without notice, and in his absence, and it was further made contrary to law. The petition prayed that the order of *nolle pros.* be stricken and that the said information be presented to the grand jury although the district attorney had refused so to do. In accordance with said petition the court fixed November 6, 1942, as the time for hearing.

19. On December 23, 1942, the court acting through John J. Kennedy, a member of this court and assigned to the quarter sessions court, made the following order:

"And now, December 23, 1942, after argument and review of the records and of the briefs submitted, it is ordered and decreed that the petition be and the same is hereby dismissed."

Judge Kennedy in his opinion, among other things said:

"Reviewing all this record, we are of the opinion that the district attorney at this time neither has in his possession sufficient evidence to request the court that the district attorney's bill of indictment be presented to

the grand jury, and further, if the district attorney, in his anxiety to fully perform his duties, would request permission to submit such a bill, such permission would be denied. Our conclusion, therefore, is that the prayer of the petition must be disallowed and an order will be made to that effect."

20. The defendant here again resorted to the civil court by filing a suit in trespass at No. 1669 October term, 1942, against Max Perlman, one of the plaintiffs here, charging conspiracy and libel because of the letters of August 27, 1941, as heretofore set forth naming Max Perlman as defendant and claiming damages in the sum of $25,000.00. The docket entries show service of the writ and filing of defendant's plea on December 1, 1942. No further proceedings have been had and said case has not been placed at issue nor brought to trial. A similar case has been brought against William C. McEldowney at No. 1670 October term, 1942, as well as a similar case against Charles H. Sachs at No. 1671 October term, 1942; the three cases are similar in nature, charging the same amount of damages and the docket entries are the same.

21. On December 23, 1942, the present bill in equity was filed, together with injunction affidavits and a restraining order was isssued. The court being the writer of this adjudication, fixed January 6, 1943, as the date of the final hearing on the merits. This was done with the understanding by the court at the time, that the case would be heard on the merits. On January 6, 1943, however, the defendant, Phillip Ginsburg, did not appear in person but was represented by his son and lawyer, who contended that he had never agreed to a final hearing on the merits on that date. Thereupon, a hearing was had and after a full day of testimony the defendant's counsel,

Paul Ginsburg, argued a verbal motion to dismiss the bill for lack of jurisdiction. Counsel for defendant cross-examined all witnesses, fully represented his father, the defendant, and at the close of plaintiffs' testimony refused to offer any testimony on behalf of defendant for the reason, as he gave, that "these complainants have not made out a case." This court made an order continuing the restraining order and enjoined and restrained the defendant, his son, or his or their agents, from making or filing any other or similar informations charging these three defendants with "Conspiracy in the nature of sending of the letters described in the bill, or in any of the matters or things embraced in the two previous informations charging conspiracy, described in the bill, or with criminal libel in connection with said letters."

22. At the close of testimony and the hearing as above stated, counsel for defendant was requested to file an answer, which he agreed to do, but, however, on January 25, 1943, defendant, through his counsel, filed preliminary objections to the bill which, by special order of court, was duly argued on February 5, 1943, and on February 9, 1943, the preliminary objections were dismissed and defendant directed to answer, which was accordingly done.

23. By special arrangement the date for trial was fixed for February 18, 1943, at which time counsel for plaintiffs then and there offered to use, as we understood according to stipulation entered into by both parties, all the testimony taken at the hearing on the preliminary injunction, subject to ruling and exceptions thereon, in order to save time for the court, to which defendant's counsel refused to agree. Following such refusal a full hearing was entered into, at which time the defendant

here admitted that he objected to the issuance of an injunction for the reason he intended to make further informations against these plaintiffs, based on the same facts.

DISCUSSION.

The foregoing findings of fact are fully supported by the evidence and exhibits produced. Counsel for the defendant contends throughout these proceedings that this court of equity has no jurisdiction. He has submitted requests for two findings of fact. First, the purpose of the bill of complaint is to enjoin Phillip Ginsburg, his agents, or attorneys from instituting criminal prosecutions on charges of libel and conspiracy. This is a fact and we have so found.

Second, the evidence introduced on behalf of defendants is incompetent, irrelevant and immaterial. This is without merit. If our position, which will be later stated, is correct that equity has jurisdiction, the testimony then is competent, relevant and material and is not disputed.

While counsel for defendant submits several requests for conclusions of law, they amount to his contention that the court of equity has no jurisdiction. We will try to deal with this as thoroughly as we can without encumbering the record.

As we have found by our findings of fact that the defendant here was a customer of the Washington Trust company, located on Fifth avenue at Washington street, in the city of Pittsburgh, which is an old established banking institution; plaintiffs involved in this case are officers of this institution.

Charles H. Sachs we can state from personal knowledge, and can be borne out by the bench and bar of this

court, has a reputation beyond reproach. He has been such a reputable member of this bar for upwards of forty years. We know that Mr. Sachs in the last year or two has not been well and should not be annoyed by vexatious litigation.

William C. McEldowney, as we have stated, is a reputable member of this bar, but is inactive; his whole time has been given to his position as president of the Washington Trust company; he is a man past seventy-five years of age and, as he stated on the witness stand, his health has not been good and unusual things are annoying.

Max Perlman is a younger man, but of the highest standing in the community, and he is treasurer of this trust company.

We have recited fully in our findings of facts the transactions that took place between this defendant and the representatives of the Washington Trust company. We have recited in our findings of facts that the officers of this trust company, upon learning that defendant had violated the confidence they had in him by collecting the book accounts without giving the bank a full and just accounting, and after he admitted he had converted the proceeds to his own use when he still was indebted to the trust company. These officers in sending out this letter did not act on their own initiative, they took counsel and the matter was presented at a regular meeting of the board of directors which board of directors is composed of reputable business men of this community, as shown by the evidence. The board of directors then passed a resolution directing what was to be done, that is, send out letters to these debtors to find out the standing of their accounts. The sending out of these letters, as we

recited in the findings of fact, is the basis for the prosecutions for conspiracy and libel.

If any person conspired in this case it was the board of directors and it would be ridiculous to charge them with conspiracy.

This court, through representatives sitting in quarter sessions court, has held that the sending of these letters was not libelous; it has held that there was no conspiracy that could be charged against them, then defendants and now plaintiffs; they were discharged on regular proceedings after informations were made and they were bound over for court. Charges were repeated and again they were discharged. Counsel for the defendant, the son, went to counsel for the plaintiffs in this case and advised that similar prosecutions would be continued. The defendant, himself, on the witness stand during the hearing of this case, said that their purpose and desire to defeat this bill was so they could continue prosecutions. This, as we look at it, is not a proceeding to interfere with the court of quarter sessions; it is not a proceeding to shield plaintiffs from a legal prosecution; it is a proceeding to protect them from vexations and unscrupulous litigation. Civil court has been resorted to, as we say, in bringing actions against the trust company as well as the plaintiffs in this case, for damages. No one has interfered with their being placed at issue and, if defendant here has been grievously injured and his reputation has been impugned, money damages can be allowed him.

Oft times the question may arise when prosecutors go into criminal court for certain prosecutions which, in many instances turn out to be persecutions, "what is the motive?" Oft times a money consideration will stop those prosecutions.

We come now to the question of law as to whether the collateral pledged for the collateral note referred to in our findings of fact is collateral for other liabilities and is a valid provision.

In the case of Commonwealth ex rel. Todd, Atty. General, v. Bank of Pittsburgh, Pa., 246 Pa. 519, the court said, at page 523:

"Undoubtedly Muehlbronner could stipulate that his own certificates which were thus deposited, should be held as security for any other indebtedness of his own. * * * True it is, that it was there, and the maker must be presumed to have read the note, and to have been familiar with the language of the instrument which he was signing."

We believe this is sufficient to base our conclusion that as these book accounts were twice assigned, once by stamped assignment on the statements of accounts, and again by regular form of assignment of book accounts given the bank. The bank had a right to attempt to collect the indebtedness and apply it to the liabilities in the bank. The defendant cannot take the position that these accounts did not pass to the trust company as security for the notes. He hindered and prevented the assignee from collecting payments of certain accounts by reason of the fact that he collected and converted this money to his own use to pay other indebtedness.

We have already stated that no successful prosecution could be made for conspiracy against these three plaintiffs. We are just as firmly of the belief that no successful prosecution could be made against these plaintiffs, jointly or separately, on the charge of criminal libel. These facts have been adjudicated by the court of quarter sessions of this county and the findings have been unappealed from. It must be borne in mind that

this is not an attempt to enjoin the district attorney, the public prosecutor of this county, from assuming conrol or to interfere in any way with the jurisdiction or control of the court of quarter sessions.

The bill, as stated, does seek to enjoin defendant, his agents, attorneys, or others from proceeding with vexatious litigation. A case in point is the case of Trees et al. v. Glenn, as reported in 319 Pa. 487. This is where a bill was filed in this court to restrain a defendant from proceeding with a suit in Butler county. It was argued that equity did not lie, but the supreme court held that a court can always protect its own jurisdiction. At page 491, the court said:

"In such a case it may restrain a party from prosecuting a subsequent suit in another jurisdiction, whether the objects of the two suits are the same or not, if the effect of the second suit is to withdraw from the court first acquiring jurisdiction a part of the subject-matter of the first suit. When an injunction is granted for this purpose, it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even assume to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had, nor denies its jurisdiction."

Further, on page 495, we quote:

"In his great work on Equity Jurisprudence, 14th ed., volume 2, section 1226, page 582, Mr. Justice Story under the head 'Injunction to Suppress Vexatious Litigation' has the following to say: 'Another class of cases of an analogous nature to which the process of injunction is also most beneficially applied is to suppress undue and vexatious litigation. We have already seen the man-

ner in which it is applied in cases of bills of peace. But courts of equity are not limited to their jurisdiction to cases of ths sort. On the contrary they possess the power to restrain and enjoin parties in all other cases of vexatious litigation. Thus for instance where a party is guilty of continual and repeated breaches of his covenants; although it may be said that such breaches may be recompensed by repeated actions of covenant, yet a court of equity will interpose and enjoin the party from further violations of such covenants. For it has been well remarked that the power has in many instances been recognized at law as resting on the very circumstance that without such interposition the party can do nothing but repeatedly resort to law, and when suits have proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a court of equity attaches."

We will agree had Mr. Ginsburg merely threatened to bring prosecution in the criminal court, we would be without jurisdiction, as a court of equity will not enjoin criminal proceedings.

Counsel for the defendant bases his position on two cases. We consider first the case of Cohen v. Schofield, 299 Pa. 496, in which case the supreme court affirmed the decree of the lower court in dismissing plaintiff's bill. The law as laid down in this case, of course, we do not quarrel with, as the bill in the recited case was to enjoin the police authorities of the city of Philadelphia from interfering with plaintiffs in conducting their respective manufacturing plants, praying for the return of property seized by the police and that further seizure be restrained.

The seizure in that case was made on the ground that the perfume comprising the shipment was not man-

ufactured in accordance with the federal permit, admittedly held by the manufacturer of the perfume, but was so differently prepared as to permit of being readily converted, by distillation or other simple process, into alcoholic liquor, fit for beverage purposes, the manufacture and sale of which were unlawful under the provisions of the act of March 27, 1923, P. L. 34, known as the Snyder act.

The second case is the case of Long et al. v. Metzger et al., as reported in 301 Pa. 449. It is true in this case the court held "an injunction will not be granted to stay criminal or quasi-criminal proceedings, whether the prosecution is for the violation of the common law or the infraction of statutes or municipal ordinances, nor to stay the enforcement of orders of a state commission."

In this case the medical practice act of June 3, 1911, P. L. 639, and its supplements and amendments, was questioned. Plaintiffs sought to restrain prosecution under this act. It was there held:

"Courts will not interfere by injunction where the injury inflicted or threatened is merely the vexation of arrest and punishment of the complainant, who is left free to litigate the question of unconstitutionality of the statute or ordinance or its construction or application, in making his defense at the trial or prosecution for its violation."

We are again of the opinion that the above recited case is not controlling in the instant case for the reason as stated before, prosecutions have been made and the legality adjudicated, and in the presence of the chancellor threats have been made for further prosecution.

We note from a case decided in the state of Kansas, it was held that repeated criminal prosecution may be

enjoined in equity. Foley v. Ham, 102 Kan. 66, L. R. A. 1918C. 204, at page 208:

"5. The decision that the order against the justice of the peace was properly granted renders of little practical consequence the question whether error was committed in rendering judgment against the individual defendants. As to them the action was one of injunction, and was maintainable for the same reasons that justified the prohibition against the officer, unless by reason of the rule which has sometimes been announced, that injunction against the prosecution of a criminal action will not lie except for the protection of property rights. 22 Cyc. 904; 14 R. C. L. 428. This rule seems to be founded on these considerations: The accused has usually a fairly adequate remedy by making his defense in the criminal action; a court of equity has no jurisdiction of the criminal matters, that subject being committed to courts of law; as a matter of public policy the court ought not to interfere with the representatives of the public seeking the enforcement of the law. *In the case of numerous, repeated, and vexatious prosecutions, it is evident that the remedy of meeting the charges in the courts where they are brought may not be entirely adequate; where the same court has jurisdiction of legal and equitable matters distinctions founded on that difference are of little importance; and with respect to an injunction which runs not against the public prosecutor, but against individuals who seek to direct the machinery of the criminal law in opposition to his judgment, the objection based on a reluctance to embarrass officers in discharging their duty to the government does not apply.* A court of equity would seem to be as responsive to a call for the protection of personal rights, in an appropriate case, as to one for the protection of rights relating

to property. In Brown v. Nichols, 93 Kan. 737, L. R. A. 1915D, 327, 145 Pac. 561, it is said: 'The remedy of injunction may be employed to protect personal and property rights, although it may operate incidentally to restrain a prosecution under an invalid ordinance.' Syllabus, 2." (Italics ours.)

There has been on our statute books a stern enactment prohibiting injuries by reiterating commitments for similar offenses and we quote from the act of 1785, Feb. 18, 2 Sm. L. 275, sec. 11. It is found in 12 Purdon's sec. 1886.

"And for preventing unjust vexation by reiterated commitments for the same offense, Be it enacted, * * * *That no person* who shall be delivered or *set at large upon a habeas corpus shall,* at any time thereafter, *be again committed* or imprisoned for the same offense, *by any person* or persons whatsoever, *other than by the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause,* and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offense or supposed offense, any person delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved, any pretense of variation in the warrant or warrants of commitment notwithstanding, the sum of five hundred pounds, to be recovered by the prisoner or party grieved, in manner aforesaid." (Italics ours.)

This act has been construed by our supreme court in the case of Zebley v. Storey, 117 Pa. 478, at page 488:

"The offense with which the plaintiff was charged was a mere misdemeanor. It lacks every element of

public importance. Such prosecutions are seldom resorted to, except to collect a debt, and one can hardly imagine an instance in which a public prosecutor would ever interfere in such a case where the offender has been discharged upon *habeas corpus. And as the private prosecutor may not rearrest the party, such discharge, for all practical purposes, is an end of the case.* * * *" (Italics ours.)

Should the defendant, by himself with the connivance of his son, be permitted to make further informations based upon the same facts, we could see what damage may be done to these reputable citizens.

If an unscrupulous prosecutor would go to an alderman or justice of the peace late in the evening, make similar informations, the alderman, being unscrupulous, would cause the arrest of these same defendants and have them placed under arrest and, in their failure to give bond, be confined over night, the injury and damage done to them might be irreparable.

CONCLUSIONS OF LAW.

From the facts as recited and our discussion, we reach the following conclusions of law:

1. The action of the board of directors of the Washington Trust company directing that notice be sent to the customers of the defendant of the assignment of their accounts, and asking for payment thereof be made to the bank, was proper and a lawful action; and the acts and conduct of the plaintiffs as members of the board of directors and officers of the trust company, and plaintiff Sachs, as its solicitor, before, in and after the sending of the letters of August 27, 1941, were proper and lawful acts since the collateral notes of May 12 and May

29, 1941, and the written assignments in connection therewith, were lawful and binding upon the defendant, including the provision that the collateral was pledged for any and all other liabilities of the defendant held by the trust company, and the right of the trust company to demand and receive payment from defendant's customers.

2. We cannot find that there was an agreement expressed or implied, between the plaintiffs or with any other person, to injure or defame defendant or to hinder or damage him in the conduct of his business or trade as a merchant, either to accomplish any unlawful object or to accomplish a lawful object by unlawful means.

3. The letters of August 27, 1941, were not libelous in law, and were so adjudicated in the court of quarter sessions of Allegheny county at Nos. 192, 193 and 194 June sessions, 1942, miscellaneous.

4. The litigation instituted and carried on by the defendant has been and is and will continue to be, unless enjoined, vexatious and malicious. Plaintiffs, Messrs. Sachs and McEldowney, as reputable members of the bar of this county, have property rights, to-wit, their right to practice their profession and such right has protection in equity and they are entitled to be relieved of the annoyance and expense of prosecution at the instance of the defendant, under the circumstances of this case; otherwise they will be irreparably damaged.

5. Having assumed jurisdiction as we have, it is likewise our duty to grant protection to the plaintiff, Max Perlman.

6. A permanent injunction should issue enjoining and restraining the defendant, Phillip Ginsburg, and his

agents and attorneys, from filing and making, or causing to be made, any information or informations against the plaintiffs, or any of them, charging them with conspiracy in the matter of the sending of said letters of August 27, 1941, or in the matter of any correspondence following and relating to said letters of August 27, 1941, or in any of the matters or things embraced in the informations charging conspiracy and criminal libel in connection with said letters filed respectively in the office of Alderman Newell and Alderman Murray of the city of Pittsburgh.

DECREE NISI.

April 29, 1943, after hearing and full consideration, the preliminary injunction heretofore issued is made final, and it is ordered, adjudged and decreed: 1. That a final injunction issue and the said Phillip Ginsburg, the defendant named, his counsellors, attorneys and agents, are hereby enjoined and restrained from filing, making or causing to be made, any criminal information or informations against the plaintiffs, Charles H. Sachs, William C. McEldowney and Max Perlman, or any of them, charging them with conspiracy or criminal libel, in the matter of the letters as fully set forth in the findings of fact No. 10, or in any of the matters or things embraced in the criminal information heretofore made. 2. Costs of these proceedings shall be paid by the defendant, Phillip Ginsburg.

OPINION SUR EXCEPTIONS.

Before ROWAND, P. J., MCNAUGHER and THOMPSON, JJ.

ROWAND, P. J., for the court *en banc*, May 25, 1943. —This is now before the court *en banc* on exceptions of defendant to the chancellor's rulings, findings of facts and conclusions of law. There are forty exceptions filed by counsel for defendant, not for the purpose of expediting these proceedings, but for the purpose of prolonging and a continuous attempt to harass and annoy the chancellor.

At the hearing before the court *en banc* counsel for defendant was asked whether he intended to argue on the forty exceptions filed and his reply was in the negative; that he wished to confine himself only to the question of jurisdiction of the court of equity.

Counsel for defendant was asked by counsel for plaintiff if he would withdraw his exceptions and argue the question of jurisdiction and again his answer was in the negative; that he wished to stand on certain rulings that might be helpful to him and if he would withdraw then it might be harmful in the civil cases now pending.

The first ten exceptions are to the refusal of the chancellor to affirm the requests for findings of fact. The chancellor in his adjudication and in his discussion dwelt with the requests of counsel for defendant, while they were not taken up *seriatim* and discussed separately for the reason, as we have said in the adjudication, the several requests amounted to but two propositions, namely: First, that the evidence was incompetent, irrelevant and immaterial. This was discussed in our conclusions of law. Secondly, we further found that while there were several different requests they all amounted to the same thing, namely, that the court of equity had no jurisdic-

tion. The requests both for findings of fact and conclusions of law were fully discussed in our adjudication, which we believe, is unnecessary to again reiterate, particularly the discussion of the chancellor.

The eleventh to the thirty-third exceptions, inclusive, to the findings of fact are embraced in findings first to twenty-third, inclusive. In other words, each finding of the chancellor has been excepted to, merely stating that the defendant excepts to the chancellor's findings of fact. To show the absurdity and the attempt to prolong this litigation, counsel for defendant objected to the finding of fact number ten which is a copy of the letter sent out by the trust company, which is the basis of this litigation. Each finding of fact made by the chancellor was made upon the review of the testimony taken at both the preliminary and final hearings in this case and they are uncontradicted by any testimony produced by the defendant.

The court *en banc,* therefore, is of the opinion that the testimony fully supports the findings of fact and they should not be changed, and the exceptions are therefore dismissed.

The thirty-fourth to the thirty-ninth exceptions, inclusive, except to the conclusions of law one to six inclusive, as found by the chancellor. The conclusions of law rest on the findings of fact and the discussion of the chancellor and as we do not change the findings of fact, we are of the opinion that exceptions to the conclusions of law should be dismissed.

The 40th exception excepts to the entering of the decree *nisi.* As we have not changed the findings of fact and conclusions of law, we are of the opinion that the exception to the decree *nisi* is without merit and is therefore dismissed.

Counsel for plaintiffs has called our attention to typographical errors contained in the sixteenth finding of fact: we quote the finding of fact:

"16. On August 4, 1942, the defendant, Phillip Ginsburg, further appeared before Alderman Murray of the city of Pittsburgh and filed identical informations against the three plaintiffs herein, one charging conspiracy and the other charging libel. Warrants were duly issued and the three defendants were again arrested and gave bail, and hearing was set for August 12, 1942, at which time both cases were heard together. The three defendants were held for court on the charge of conspiracy and because the evidence did not support the charge of libel, the defendants were discharged."

This was in error as the last sentence of this finding should read as follows:

"The three defendants were held for court on the charge of libel and because the evidence did not support the charge of conspiracy, the defendants were discharged."

Further, by inadvertence or typographical error it appears in the findings of fact number seventeen, that "the case came on for hearing and was heard August 21, 1942," this should have read "September 30, 1942."

Further, in the finding of fact number eleven it is stated that the action against the trust company was in the sum of "twenty-five thousand dollars." This should read: "twenty thousand dollars."

We are of the opinion, however, that these typographical errors are of very little consequence in the final disposition of this case.

Counsel for plaintiff also complains of our refusal to affirm or treat the thirteenth finding of fact as requested. While this is a fact uncontradicted we would

therefore include it now as a finding of fact and add it, which reads as follows:

"13. Until October 23, 1941, defendant made no effort to pay the balance of the collateral note of May 29, 1941, or to renew or pay his overdue non collateral promissory note; on October 23, 1941, the defendant did pay the balance then due on his collateral note of May 29, 1941; he then did pay the accrued interest from August 1 to August 22, 1941, on the collateral note of May 12, 1941, and he did renew his non collateral promissory note in full by giving a new note for ninety days, due January 21, 1942; and when due, this note was further renewed for sixty days, to become due March 23, 1942, the discount being $5.08, which was paid by the defendant to the trust company; eight days later, to-wit, January 29, 1942, the defendant paid off in full the $500.00 non collateral note, and the trust company, although it was not required so to do, refunded to him the discount of $5.08."

Counsel for defendant for the first time at the oral argument, referred to the case of Meadville Park Theatre Corporation v. Mook, 337 Pa. 21. This we have examined and had examined before our adjudication, but we are of the opinion it is not in point because the alleged law infraction was never passed upon by the quarter sessions court. As we have already said in the instant case, the law infractions have been passed upon by representatives of this court, sitting in quarter sessions court. Also, in the Meadville Park Theatre case, the attempt was to enjoin the district attorney but, as we already said, this is not an attempt to enjoin the district attorney or any public officer in the discharge of his duty, nor to interfere with the court of quarter sessions.

The Meadville case recognizes that there are exceptions to the general rule and, as we have already pointed out in our opinion, this is vexatious and harassing litigation that is attempted to be stopped, and comes within one of the exceptions as pointed out in the Meadville case.

Counsel for defendant has recited further lower court decisions that are not in point and, upon examination, we find they are prior to the *habeas corpus* act of 1937, which is an extension of the bill of rights. It is the duty of the court when a petition is filed, to hear it and determine the act on the merits of the case. The records of quarter sessions court show that this was done in at least two instances.

FINAL DECREE.

May 25, 1943, after hearing and full consideration, the preliminary injunction heretofore issued is made final, and it is ordered, adjudged and decreed:

1. That a final injunction issue and the said Phillip Ginsburg, the defendant named, his counsellors, attorneys and agents, are hereby enjoined and restrained from filing, making or causing to be made, any criminal information or informations against the plaintiffs, Charles H. Sachs, William C. McEldowney and Max Perlman, or any of them, charging them with conspiracy or criminal libel, in the matter of the letters as fully set forth in the findings of fact No. 10, or in any of the matters or things embraced in the criminal information heretofore made.

2. Costs of these proceedings shall be paid by the defendant, Phillip Ginsburg.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1210

PAUL GINSBURG,

Petitioner,

vs.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY AND MAX PERLMAN

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR RESPONDENTS

PAUL GINSBURG,
Counsel for Petitioner.

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No. 1210

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CHARLES H. SACHS, WILLIAM C. McELDOWNEY AND MAX PERLMAN

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR RESPONDENTS

Argument

I. *Respondents did not raise in the court below the objection that petitioner was not a party to the appeal which was non prossed by the Supreme Court of Pennsylvania, and they cannot raise this objection now. Actually petitioner was made a party through the injunction decree obtained by respondents.*

The averments of the petition for reconsideration in the Pennsylvania Supreme Court (R. 7-10) made it plain that your petitioner was made a party to the proceeding by reason of the injunction decree issued by the Court of Common

Pleas (R. 7). As the respondents elected not to file an answer to said petition, the averments must be taken to be admitted (Petition, page 8). Having failed to object in the court below that petitioner was not a party, respondents cannot do so now.

It is contended by the respondents that the decree affects the petitioner only in his representative capacity, that the petitioner cannot inject himself into this case and that this litigation is stale (Brief for Respondents, Page 7). Actually the language of the decree is very plain, and it enjoins your petitioner not as attorney for Phillip Ginsburg but because he was attorney for Phillip Ginsburg. Your petitioner has been advised that if he should file new informations against respondents on the same criminal charges before the injunction decree is dissolved, he would be liable for contempt.

Petitioner did not inject himself into this case. If he was injected into it, that was accomplished by respondents when they procured the injunction decree.

This litigation is not stale, and has never been abandoned. An examination of the Record filed with your Honorable Court at No. 779, October Term, 1945, in the case of *Paul Ginsburg, Petitioner,* v. *Russell H. Adams,* will show that at all times since the injunction decree was entered, in this and related proceedings, the same questions have been actively pressed.

II. *Respondents did not raise in the court below the objection that the Soldiers' and Sailors' Civil Relief Act has no application to this case because the judgment of non pros in the Supreme Court of Pennsylvania was not entered against an appellant in the military service, and they cannot raise this objection now. The judgment of non pros was entered against a party in the military service who was in the same position as appellant, and the statute does have application to this case.*

The averments of the petition for reconsideration in the Pennsylvania Supreme Court (R. 7-10) made it plain that your petitioner was in the position of an appellant in the military service entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act. As the respondents elected not to file an answer to said petition, the averments must be taken to be admitted (Petition, page 8). Having failed to object in the court below that petitioner was not in such position, respondents cannot do so now.

The Soldiers' and Sailors' Civil Relief Act does have application to this case (R. 9, 10), (Petition, pages, 2, 3, 4, 8, 9, 10).

III. *Respondents did not raise in the court below the objection that the Soldiers' and Sailors' Civil Relief Act has no application to this case because no default judgment was entered, and they cannot raise this objection now. The statute does not relate to default judgments only, and does have application to this case.*

The averments of the petition for reconsideration in the Pennsylvania Supreme Court (R. 7-10) showed that the Soldiers' and Sailors' Civil Relief Act does have application to this case. As the respondents elected not to file an answer to said petition, the averments must be taken to be admitted (Petition, page 8). Having failed to object in the court

below that the Soldiers' and Sailors' Civil Relief Act has no application to this case, the respondents cannot do so now. Furthermore, Sections 200 (4) and 201 of the Act (Petition, page 4) have particular application to this case. These sections do not even mention default judgments. Section 200 (4) in effect gives relief from any judgment in any action against any person in military service upon application made not later than ninety days after the termination of such service, which applies to this case (R. 3-5, 9). Section 201 in effect provides that when petitioner personally appeared before the Pennsylvania Supreme Court on September 27, 1943, requesting a continuance (R. 8), (Petition, pages 5-7), his request ought to have been granted, because any proceeding in any court at any stage thereof shall upon application to the court be stayed.

It is further submitted that the judgment of *non pros* (R. 3) was a sort of default judgment, and is commonly frowned upon as a "snap" judgment.

IV. *Both the petitioner and his father have a meritorious and legal defense to the injunction suit.*

The meritorious and legal defense to the injunction suit has been dealt with by your petitioner (R. 9), (Petition, pages 11-13).

The theory of vexatious litigation which respondents framed as a basis for the injunction suit was a smoke screen. This theory was founded upon the construction often given *habeas corpus* discharges being conclusive and being a final termination of the prosecution. Since the foundation of the original theory has no legal basis, the theory itself must fall.

Every step taken by the defendants in the criminal prosecutions, Messrs. Sachs, McEldowney and Perlman, have had as its aim a proceeding before a judge without a jury, to escape the ordinary processes of the criminal law. In the *habeas*

corpus proceedings they presumed to have their guilt or innocence so adjudicated. In the injunction proceeding they went even further by attempting to have their guilt or innocence adjudicated by a court of equity. The Commonwealth, as well as alleged lawbreakers, has an interest in the maintenance of the right of trial by jury. It is difficult to conceive of anything more opposed to sound public policy than to permit an accused to obstruct by means of a suit in equity to which the state itself is not a party the operation in his case of the machinery of criminal procedure which has been constitutionally established to protect the public welfare.

In the criminal prosecutions the defendants have an adequate remedy at law, by defending the charges in criminal court. There they can be acquitted, if, as they claim, they are not guilty. But they cannot be tried in any other court, according to law.

V. *The applicability of the Soldiers' and Sailors' Civil Relief Act was not raised too late. The respondents' objection that it was has been raised too late because they did not raise this objection in the court below.*

The timeliness of raising the applicability of the Soldiers' and Sailors' Civil Relief Act has been adequately dealt with by your petitioner (R. 9-10), (Petition, pages 2-4, 7-10.)

The respondents did not raise in the court below the objection that the applicability of the Soldiers' and Sailors' Civil Relief Act was raised too late, and they cannot raise that objection now.

VI. *The petition for writ of certiorari was not filed too late.*

The timeliness of the filing of the petition has been adequately dealt with by your petitioner (Petition, pages 2, 8-9).

Respondents' erroneous computation of the time for filing appears on page 13 of Brief For Respondents, and is perhaps due to a misapprehension of the procedure applicable. They did cite, however, the correct statutory limitation of three months (28 U. S. C. A. 350) and the correct date of the final order of the Pennsylvania Supreme Court, March 26, 1946, from which date the three months begin (Petition, pages 2, 8-9). The petition was filed on May 7, 1946, within less than one-half the time allowed.

Respondent Charles H. Sachs and his counsel, Louis Caplan, have been partners in the law business for many years under the firm name of Sachs & Caplan, and they long ago got a reputation as bankruptcy experts. However, it is submitted that the reference to general order in bankruptcy No. 36 (Brief for Respondents, page 14) has no application to this situation whatever.

VII. *The criminal prosecutions against respondents, Charles H. Sachs, William C. McEldowney and Max Perlman, have never been properly disposed of in criminal court.*

It is contended on behalf of respondents that the prosecutions against them have twice been adjudicated in criminal court because on two occasions they procured *habeas corpus* discharges. Both times they were discharged under their writs not only before the informations were presented to the grand jury, but also before the "prisoners" were even committed. A writ of *habeas corpus* is an extraordinary writ, granted only in unusual cases where there is a pressing need for it. What makes the granting of the writs in the instant case all the more preposterous is the fact that your petitioner offered his consent each time that the respondents be released on their own recognizances.

To agree with this contention, one must also agree with their legal theory that a *habeas corpus* proceeding can be used as a substitute for trial.

It is elementary that a *habeas corpus* proceeding relates only to the legality of the detention of a prisoner, and that the order of discharge can only be for release out of custody. The *habeas corpus* discharge does not end the prosecution. After such discharge it is still the duty of the district attorney to present the information to the grand jury. However, in the instant case, the district attorney refused to present the informations to the grand jury after the *habeas corpus* discharges, although he had given your petitioner his opinion before the first information was filed that the prosecutions should be instituted and the district attorney had the informations prepared in his office.

Pennsylvania cases in which it is clearly and definitely held that *habeas corpus* discharges have no further effect than to release the prisoners out of custody, are *Commonwealth* v. *Crawford,* 8 Philadelphia Reports, 490; *Schopffel* v. *Kleinz,* Brightly's Nisi Prius Reports, 132; and *Commonwealth* v. *Ridgway,* 2 Ashmead's Reports, 247. There are no authorities to the contrary.

In *Commonwealth* v. *Crawford,* Judge Peirce in his opinion, p. 490, held: "It is not necessary to inquire into the realtive jurisdiction of these officers further than to say, that neither the committal nor the discharge is finally conclusive of the responsibility of the relator for the offense with which he is charged. Not even a discharge under this *habeas corpus* would have any further effect than to discharge the relator out of custody, leaving the alleged offense subject to the investigation of a grand jury, and if a true bill be found, to the final determination of a petit jury—all other investigations being but of a preliminary character for the furtherance of the ends of justice."

In *Commonwealth* v. *Ridgway,* Justice Randall in his opinion, p. 256, the relator having been discharged after the court found no criminal conspiracy had been proved, stated: "It may be proper to state, that the testimony

before the court was different from that before the mayor. Several witnesses, and among them, one said to be the most important for the commonwealth, who were examined there, were not examined in court; and what effect their testimony would have had, it is impossible to tell. Should the counsel for the commonwealth think they can present a different case at a future day, it is gratifying to know, that this decision does not preclude them from sending a bill to the grand jury whenever they may think proper so to do."

In the same case President Judge King in his opinion, pp. 258-259, stated: "I rejoice, however, that our judgment is not conclusive of the subject. The sole effect of this decision is, that in the present state of the evidence, we see no sufficient cause to hold the defendant to bail. It is still competent for the proper public officer, particularly in a different state of the evidence, to submit the case to the grand jury. That respectable body are entirely independent of us; they can form their own views of the prosecutor's case, and may, if their judgment so indicates, place the defendant on his trial; we at present do not see adequate cause to induce us either to restrain him of his liberty, or compel him to give bail to answer. He is discharged."

These opinions of President Judge King and Justice Randall are of particular importance in view of appellant's contention during the *habeas corpus* proceedings that, although he more than established a *prima facie* case, he purposely did not introduce all the evidence before the alderman and that he has additional facts and evidence to present to the grand jury and the trial jury.

In *Schopffel* v. *Kleinz*, p. 132, it was held that, "a discharge on *habeas corpus* does not end the prosecution: it only relieves the defendant from imprisonment, but he may still be indicted on the original complaint."

These decisions are very definite, and they have not been modified.

VIII. *Judge Rowand's Opinion was biased.*

It is stated (Brief For Respondents, Page 10) that petitioner attempted "to brush aside the opinion of the Court of Common Pleas." It is respectfully submitted that the said opinion of President Judge Harry H. Rowand ought to be brushed aside, and set aside. Some of his Findings of "Fact" and Conclusions of "Law" are very unfair, unjust and without foundation. After defendants Sachs, McEldowney and Perlman of the criminal prosecutions had transformed themselves into plaintiffs in equity and framed their injunction case, Judge Rowand thoroughly cooperated with them in making the prosecutor look like a defendant. From reading Judge Rowand's opinion, your petitioner could not recognize the case of the prosecution, nor could he recognize Messrs. Sachs, McEldowney and Perlman, Judge Rowand praised them so highly.

So far as your petitioner and his father are concerned, let us add that your petitioner at that time was a member of the Bar in very good standing and was an elected Officer of the Allegheny County Bar Association; and that his father, Phillip Ginsburg, enjoyed an excellent reputation among his customers and in the community.

Presumably one of the reasons why Judge Rowand adopted such a hostile attitude toward your petitioner and his father was that your petitioner attempted to have Judge Rowand removed from the case on grounds of bias and to have any other judge of said Court of Common Pleas substituted for him. Immediately after the injunction suit had been filed and before it came up to be assigned for hearing from the Assignment Room of the court, Judge Rowand as President Judge of the Court of Common Pleas of Al-

legheny County, ordered the case assigned to himself for hearing. On the day of the preliminary hearing when your petitioner and the parties appeared in the Assignment Room, the case was assigned to Judge Rowand by the Assignment Room judge, to which your petitioner objected contending that this case ought to be assigned in the ordinary course to the next judge (whoever he may be) like any other case. However, the Assignment Room judge replied that the case had previously been ordered assigned to Judge Rowand and that he could not and would not do anything about it. Judge Rowand's opinion, which has been printed as an appendix to Brief for Respondents, fully supports petitioner's contention that the Judge was quite biased throughout the proceedings. During the proceedings, your petitioner after much difficulty, was able to secure a hearing for the purpose of determining whether or not Judge Rowand should be removed from the case. No other judge of the court would preside and Judge Rowand himself finally presided at such hearing, and at the conclusion thereof promptly dismissed petitioner's motion for his removal.

The important facts which Judge Rowand failed to find are that Phillip Ginsburg has been a merchant in Pittsburgh since 1897; that until August 22, 1941, he had been doing business with the Washington Trust Company of Pittsburgh for about 37 years; that the volume of his business with the bank approximated $6,000,000.00; that he repaid all the loans he ever made from the bank in full, with 6% interest; that on August 22, 1941, when he informed Messrs. Sachs, McEldowney and Perlman, who were officers and directors of the bank, Mr. Sachs also being counsel for the bank, that he had arranged for financing in New York City and was no longer doing business with them, they became angry and within the next few days wrote allegedly libellous letters to his customers. They wrote letters de-

manding immediate payment of old accounts which had been assigned to the bank in connection with loans, when they knew that the customers had already paid Phillip Ginsburg and that Phillip Ginsburg had already paid the bank. This was the first time that the respondents violated their agreement with Phillip Ginsburg that they would not give notice of the assignments to his customers and that he could collect the accounts like they were his own, which they were. But at that time, of course, they knew that Phillip Ginsburg would no longer be doing business with them.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

(4877)

Supreme Court of the United States

OCTOBER TERM, 1945

NO. 1210

PAUL GINSBURG, Petitioner,

v.

CHARLES H. SACHS, WILLIAM C. McELDOWNEY and MAX PERLMAN

PETITION FOR REHEARING

PAUL GINSBURG,
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PAUL GINSBURG, Petitioner,

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CHARLES H. SACHS, WILLIAM C. McELDOWNEY and MAX PERLMAN

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Paul Ginsburg for rehearing respectfully represents:

FIRST: The above entitled case came before your Honorable Court for consideration on the petition for writ of certiorari to the Supreme Court of Pennsylvania, the brief of respondents in opposition thereto and petitioner's reply brief.

SECOND: The petition for writ of certiorari was denied by your Honorable Court on June 3, 1946.

THIRD: Your petitioner prays that a rehearing should be granted in the above entitled case for the following reasons:

(a) The action of the Pennsylvania Supreme Court in refusing petitioner's Petition to Vacate Order of Non Pros and Reinstate Appeal (R. 3-5) and his petition for reconsideration thereof (R. 7-10) has deprived your petitioner of his right to a day in court and is repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States. Thus it necessarily follows that the action of your Honorable Court in denying the aforesaid petition for writ of certiorari has in effect deprived your petitioner of his right to a day in court and is repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States. The constitutional guaranty of due process of law assures to every person his right to a day in court.

(b) This case is of public importance (Petition, page 14), has not been decided on the merits by the court below (Petition, page 14) and has received widespread publicity. The fact that the publicity has created the false impression upon the public in general that the adverse decisions have been on the merits, requires that the questions involved be answered. Actually your petitioner has never lost this case on the merits in the Pennsylvania Supreme Court, but it is generally believed that he has. The record in this proceeding and in the one at No. 779, October Term, 1945 (Reply Brief, page 2), make it plain that your petitioner has taken all possible steps thus far to secure decisions on the merits of these important questions.

WHEREFORE, your petitioner prays that your Honorable Court grant a rehearing in the above entitled case.

PAUL GINSBURG,
Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

PAUL GINSBURG,
Counsel for Petitioner.
